No. 81029-0

SANDERS, J. (dissenting)—I disagree with the majority's improper expansion of RCW 4.16.160's limited exception to the six-year statute of limitations, which exempts sovereign actions brought "for the benefit of the state."[1] Construction of a professional baseball stadium for private profit is certainly not "for the benefit of the state" as that phrase is understood in our case law. I would thus affirm the order granting summary judgment of dismissal in favor of Huber, Hunt & Nichols-Kiewit Construction (HK) on statute of limitations grounds.

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[1] RCW 4.16.160:

> **Application of limitations to actions by state, counties, municipalities.**
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> The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

In an unsurprising turn of events, the PFD[2] and the Mariners[3] now ask this court to reverse the summary judgment order dismissing their Safeco Field construction defects lawsuit against general contractor HK as barred by the statute of limitations. The majority holds summary judgment favoring HK should be reversed because the construction of Safeco Field by the PFD can be traced to the delegated sovereign power of promoting "public recreation," thus qualifying for the "for the benefit of the state" exemption to the statute of limitations.

For the reasons which follow, the construction of Safeco Field does not fall within the sovereign power to promote public recreation. In summary this is so because (1) there is no mandatory constitutional or statutory duty to build a professional baseball stadium and voluntary contracts do not fall under *nullum tempus occurrit regi* (nullum tempus)[4] exemptions such as RCW 4.16.160, and

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[2] Washington State Major League Baseball Stadium Public Facilities District (PFD).

[3] The Baseball Club of Seattle, LP (Mariners).

[4] As explained by the majority, *nullum tempus occurrit regi* (nullum tempus) means "no time runs against the king." Sigmund D. Schutz, *Time to Reconsider* Nullum Tempus Occurrit Regi—*The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 Me. L. Rev. 373, 374 (2003). In other words, statutes of limitation do not apply to the State under common law or statutes such as RCW 4.16.160.

(2) the construction of Safeco Field was a proprietary, not sovereign, act because a substantial admission fee is required to enter.

As correctly observed by the majority, *Washington Public Power Supply System v. General Electric Co.*, 113 Wn.2d 288, 295-96, 778 P.2d 1047 (1989) (*WPPSS*) holds the test to determine whether a municipal action falls under the "for the benefit of the state" statute of limitation exemption in RCW 4.16.160 is whether the municipality brings an action that arises out of the exercise of powers traceable to the State's sovereign powers delegated to the municipality, rather than proprietary profit. The "for the benefit of the state" language in RCW 4.16.160 is properly understood to refer to the character or nature of municipal conduct rather than its effect. *WPPSS*, 113 Wn.2d at 293.

I also agree with the majority that to determine whether an action is sovereign or proprietary we may look to constitutional or statutory provisions identifying the sovereign nature of the power and may also consider traditional notions of powers inherent in the sovereign. *Id.* at 296. Relevant to this analysis are the general powers and duties under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign acts. *Id.*

We recently held the test for determining whether a municipal act

involves a sovereign or proprietary function is whether the act is for the common public good or whether it is for the specific benefit or profit of the corporate entity within local boundaries. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003). However I disagree with the majority's application of these principles because the PFD's construction of a $517 million professional baseball stadium to profit the Mariners was not a sovereign act, but a proprietary one.

1. Building a Professional Baseball Stadium through Voluntary Contracts Is Not a Sovereign Power or Duty Mandated under the Constitution or By Statute

The majority claims the PFD's building of Safeco Field was promoting the traditional sovereign function of "public recreation." Majority at 14-16. However the majority also concedes no part of the Washington State Constitution or any legislative enactment mandates building professional baseball stadiums. Majority at 15.

Rather, the majority purports to rely on a Maryland Court of Appeals holding in *Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. 437, 530 A.2d 245, 257-60 (1987) (quoting Md. Const. art. XVI, § 2), that construction of professional sports stadiums in Maryland through delegated governmental powers was an appropriation "'for maintaining the State Government.'" In

consequence Maryland exempts from referendum public recreational activities such as professional sports as a fundamental governmental purpose. Majority at 13-14. The majority analogizes Safeco Field's construction by the PFD under the stadium act (Laws of 1995, 3d Spec. Sess., ch. 1) to the construction of Maryland professional sports stadiums by the Maryland Stadium Authority, contending both acts promoted the sovereign function of public recreation. The majority claims this case supports its view that the suit by the PFD and Mariners against HK is exempt from the statute of limitations bar. Majority at 15-16. But the majority neglects to mention other cases from the Maryland Court of Appeals *also* hold nullum tempus laws do not apply to state subdivisions, counties, or municipalities that voluntarily contract with others. *Baltimore County v. RTKL Assocs., Inc.*, 380 Md. 670, 846 A.2d 433, 440-44 (2004).

Likewise, several Pennsylvania courts have also concluded nullum tempus does not apply to municipalities that engage in voluntary written contracts or act under enabling acts. For example the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, held the city of Philadelphia as a political subdivision of the Commonwealth of Pennsylvania could not maintain an action under the nullum tempus doctrine against

defendant manufacturers of lead based paint used in residential buildings. This was because the city of Philadelphia was suing the defendants on voluntary contracts neither mandated by constitution nor statute. *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 119-21 (3d Cir. 1993).

Pennsylvania's *Northampton County Area Community College v. Dow Chemical, U.S.A.*, 389 Pa. Super. 11, 566 A.2d 591 (1989), also illustrates nullum tempus applies only to duties imposed by law rather than voluntary enabling acts. There Dow Chemical manufactured masonry panels containing Sarabond, a mortar bonding agent used in the construction of the Engineering and Business Technologies Center in the Northampton County Area Community College (Northampton). Northampton officials later discovered likely Sarabond-related masonry cracks in the Center. *Id.* at 593-94. Northampton sued Dow in tort; however the Court of Common Pleas, Civil Division, dismissed Northampton's case on the statute of limitations grounds. *Id.* at 594. It held Northampton as a community college did not qualify under nullum tempus because contracting for the Center was a proprietary act when it acted in its proprietary capacity. *Id.* Therefore Northampton was not an agency of the Pennsylvania State Commonwealth (Commonwealth). *Id*.

The Pennsylvania Superior Court on appeal affirmed on different

grounds. *Id.* at 595-96. The superior court recognized there was a state constitutional right to public education in the Commonwealth. *Id.* at 597. However, it noted the state legislature of the Commonwealth created community colleges like Northampton through an enabling act rather than a mandated statute as was the case with state colleges. *Id.* at 596-98. After analysis of relevant commonwealth statutes, the court determined the Commonwealth did not control the community colleges' creation and operation, rather local sponsors created the community colleges. *Id.* Thus, because community colleges were established through enabling rather than mandatory acts, the superior court held Northampton did not qualify under the nullum tempus doctrine to an exemption from the statute of limitations because it was not a subdivision of the Commonwealth. *Id*.

Similarly, a Virginia court held that when the Richmond Metropolitan Authority constructed a baseball stadium as an auxiliary arm of local government funded by local revenue bonds, it was acting in a proprietary capacity and thus did not qualify under the Virginia state codified nullum tempus exemption. *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 42 Va. Cir. 243, 243-46 (1997); Va. Code § 8.01-231.[5]

[5] Va. Code § 8.01-231:

Likewise, our stadium act was an enabling act that authorized, but did not mandate, the creation of the PFD in "a county with a population of one million or more" and empowered, but did not require, it to "acquire, construct, own, remodel, maintain, equip, reequip, repair, and operate a baseball stadium." Laws of 1995, 3d Spec. Sess., ch. 1, §§ 201(1), (4)(b). King County, not the State, then created the PFD pursuant to the enabling stadium act and empowered it to build and operate a baseball stadium, just as did the community college enabling act in *Northampton County Area Community College*, 566 A.2d at 596-98; King County Ordinance 12000, § 4C at 5, 6, 8 (1995). The PFD as a municipal corporation then executed a voluntary construction contract with HK to construct Safeco Field, just as the municipalities voluntarily contracted in *RTKL Associates*, 846 A.2d at 440-44 and *City of Philadelphia*, 994 F.2d at 119-121; Clerk's Papers (CP) at 45-102. The PFD built a baseball stadium as an auxiliary arm of local government with local revenues as was the case in *Richmond Metropolitan Authority*, 42 Va. Cir. at 243-46. Moreover Washington State has a codified nullum tempus statute just like Virginia's. RCW 4.16.160; Va. Code § 8.01-231. Thus, because the PFD constructed

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Commonwealth not within statute of limitations.—No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same.

Safeco Field under voluntary contracts, and acted pursuant to enabling acts, it acted in a proprietary capacity that simply cannot qualify under the "for the benefit of the state" exemption as a matter of law.

2. The Substantial Admissions Fee Charged to Enter Safeco Field Serves the Proprietary Interest of the Mariners, Not the Public

In a last gasp for credibility, the PFD and Mariners attempt to distinguish Pennsylvania law by claiming the nullum tempus doctrine there depends on whether an action was "imposed by law" or "voluntary." Reply Br. of Appellants at 13. The PFD and Mariners contend instead that in Washington the *WPPSS* analysis under RCW 4.16.160 turns on a qualitative assessment of the nature of the delegated power, not on whether the ultimate municipal action was mandatory. *Id.*

The PFD and Mariners then contend several Washington State sovereign immunity cases, including *Russell v. City of Tacoma*, 8 Wash. 156, 159, 35 P. 605 (1894) and *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 380, 385, 261 P.2d 407 (1953), hold a municipal corporation's improvements, construction, or maintenance of public parks for public recreation involve traditional sovereign governmental functions even though not mandated by the state constitution or statute. Majority at 11. The majority argues Safeco Field's construction by the PFD is similar to the construction of a public park as a sovereign function under

the "for the benefit of the state" exemption in RCW 4.16.160. Majority at 15-16.

However, the use of the municipal parks in *Russell* and *Kilbourn* was free and truly open to the public. *Russell*, 8 Wash. at 159; *Kilbourn*, 43 Wn.2d at 380. But Safeco Field is *unavailable* to the general public. A substantial admissions fee for the Mariners' private profit is required for entry to games.[6] Profit for the Mariners is the raison d'etre for the whole enterprise. This private for profit corporation is exactly that.

Parks charging admission fees with refreshment stands are proprietary, as illustrated by *Hoffman v. Scranton School District*, 67 Pa. D. & C. 301, 301-02 (1949). There the Scranton School District owned and operated a public park

[6] Not to mention parking fees that go to the Mariners as well as the revenue from food and drink concessions operated as an extensive monopoly. CP at 323, 325. In fact, the stadium lease negotiated with the PFD gives the Mariners "the right to receive all Ballpark Derived Revenues." CP at 319. "Ballpark Derived Revenues" is defined in the lease's definitions section as including "revenues derived from future operation of the Leased Premises and any events or activities scheduled therein" (but not tax revenues received by the PFD like the "first admissions" tax), "including, but not limited to: ticket proceeds; food and beverage sales; souvenir, apparel and merchandise sales; sale or licensing of naming rights; trademark rights or copyrights pertaining to the Ballpark; marquee rights; sale of advertising; suite and club seat rental and/or licenses; proceeds from the Parking Facility" (constructed at public expense); "restaurant or retail proceeds and/or rental; revenue from broadcasting or other reproductions of events; and revenues derived from subcontracting or subleasing [Safeco Field] for other events or uses." CP at 308.

containing an enclosed sports field with spectator seating hosting a football game between two local high schools. An admission fee was charged to attend the game. *Id.* at 302. Ten thousand spectators paid that fee. Moreover refreshments were sold by concessionaires that paid a portion of that income to the school district. *Id.* at 302-03.

The school district was sued by a spectator after the spectator fell and injured himself when a shed roof which appeared to be seating collapsed. *Id.* at 302. The school district claimed governmental immunity and moved for dismissal. *Id*. at 303. Although the Pennsylvania state court recognized conduct of physical education including high school games was within the legitimate scope of school district educational activity under a traditional sovereign powers notion, and by statute to be a governmental function (*id*. at 307-08), the court nevertheless held this football game was proprietary because the promotion of the football game, admissions fees collected from 10,000 spectators, and the selling of concessions was a for-profit business. It therefore denied the school district's claim to governmental immunity. *Id*. at 308-09.

Other state courts in North Carolina, Michigan, Arizona, and Massachusetts similarly hold when a substantial admissions fee is charged by a municipality to enter a place intended for public recreation, the municipality is

acting in a proprietary capacity. *Aaser v. City of Charlotte*, 265 N.C. 494, 144 S.E.2d 610, 613-14 (1965); *Pierson v. Cumberland County Civil Ctr. Comm'n*, 141 N.C. App. 628, 540 S.E.2d 810, 811-14 (2000); *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913, 919 (1957); *Dohm v. Acme Twp.*, 354 Mich. 447, 93 N.W.2d 323, 326-28 (1958); *Rohrabaugh v. Huron-Clinton Metro. Auth. Corp.*, 75 Mich. App. 677, 256 N.W.2d 240, 243-44 (1977); *Sawaya v. Tucson High Sch. Dist. No. 1*, 78 Ariz. 389, 281 P.2d 105, 108 (1955); *Little v. City of Holyoke*, 177 Mass. 114, 58 N.E. 170, 170-71 (1900).

Ohio statutes differentiate between operations of public parks, swimming pools, zoos, and libraries as governmental functions and operations of stadiums, centers, or halls as proprietary functions. Ohio Rev. Code § 2744.01(C)(2)(d), (u)(i)-(iv), (G)(2)(e). For example in *Daniels v. County of Allegheny*, 145 F. Supp. 358, 361-62 (W.D. Pa. 1956), the United States District Court applying Pennsylvania law held a county's operation of an airport was a proprietary function because it contained a hotel, theater, night club, refreshment stands, restaurants, amusement center, drug store, gift shops, and also an observation deck from which it realized admission fees of around $50,000.

We have also held operation of concessions by a municipality at a public park is proprietary. *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 435, 723

P.2d 1093 (1986). Moreover a municipality that allows advertising on municipal property for profit also acts in its proprietary capacity. *Hillside Cmty. Church, Inc. v. City of Tacoma*, 76 Wn.2d 63, 66, 455 P.2d 350 (1969).

Here, Safeco Field requires a substantial admissions fee for a fan to enter. *Compare Okeson*, 150 Wn.2d at 550-51. *See also supra* note 6 ("[T]he stadium lease negotiated with the PFD gives the Mariners 'the right to receive all Ballpark Derived Revenues.' CP at 319. 'Ballpark Derived Revenues' is defined in the lease's definitions section as including 'revenues derived from future operation of the Leased Premises and any events or activities scheduled therein . . . including, but not limited to: ticket proceeds [and] food and beverage sales . . . .' CP at 308."). The $40 million paid for the stadium naming rights to Safeco Field is retained by the Mariners as are other revenues derived from corporate advertising. CP at 362-63. Safeco Field houses businesses such as restaurants and gift shops like those in the *Daniels* airport. *Daniels*, 145 F. Supp. at 361-62; CP at 84-86.

In *Russell* and *Kilbourn*, although this court held the construction and maintenance of public parks are sovereign functions, we also recognized that where substantial profits are made that are not incidental to the maintenance of such a park through admission fees or other methods, the function is

proprietary.[7] *Russell*, 8 Wash. at 156-61; *Kilbourn*, 43 Wn.2d at 308. Although King County and the PFD do not directly profit from Safeco Field, the excess revenues fund used to maintain Safeco Field at issue here is funded by the "first admissions" tax on admission tickets charging substantial fees to enter Safeco Field. Laws of 1995, 3d Spec. Sess., ch. 1, § 203(3)(a), at 7-8. The construction of Safeco Field, like the football field park in *Hoffman*, has all the admissions fee, advertising, and concession hallmarks of a proprietary function that was supported by King County and the PFD through King County Ordinance 12000 and the stadium act. *Hoffman*, 67 Pa. D. & C. at 301-02.

The PFD and Mariners next contend the construction of a professional baseball stadium is necessary to maintain state government. Majority at 13-16. However, it is simply an indefensible argument that building a professional sports stadium is necessary to maintain our state government. Public economic benefits are not the basis for distinguishing between governmental and proprietary functions of a municipality under RCW 4.16.160. *See WPPSS*, 113 Wn.2d at 300; *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1177-78 (E.D. Wash. 2006).

[7] Similarly, Ohio state statutes define public parks as governmental functions and stadiums as proprietary. Ohio Rev. Code § 2744.01(C)(2)(d), (u)(i)-(iv), (G)(2)(e).

As recognized by the majority, the *CLEAN* court majority admitted "it cannot be seriously contended that the development of a baseball stadium for a major league team is a 'fundamental purpose' of state government." *CLEAN v. State*, 130 Wn.2d 782, 798, 928 P.2d 1054 (1996). However our majority claims building a professional baseball stadium serves a "public purpose" and therefore asserts "the stadium project is an act in a 'sovereign capacity.'" Majority at 16 n.3. I strongly disagree that public purpose can be attributed to such a private, for-profit corporate entity as the PFD and the Mariners.

The majority judicially manufactures a sovereign function in the PFD's creation of a professional baseball stadium that is nothing other than a proprietary function for the corporate profit of the PFD and the Mariners.

If the PFD's construction and operation of Safeco Field is proprietary, the PFD and Mariners are not entitled to the "for the benefit of the state" exemption to the statute of limitations because this is not an exercise of the sovereign power to promote *public* recreation. I would affirm (1) the order granting summary judgment in favor of HK against the PFD and Mariners and (2) the sua sponte dismissal of the HK cross-claim against Long Painting and Herrick Steel. I would deny Long Painting's request for attorney fees under RAP 18.9.

Therefore, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson

Justice Tom Chambers